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The tension between state sovereignty and the international protection of HUMAN RIGHTS: LEGAL FOUNDATIONS AND THE NEW PARADIGM OF Immigration Law

THE TENSION BETWEEN STATE SOVEREIGNTY AND THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: LEGAL FOUNDATIONS AND THE NEW PARADIGM OF MIGRATION LAW

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Summary

This article investigates the fundamental dialectical tension between the classical concept of state sovereignty, a pillar of undergraduate law studies, and the demands of the international human rights regime, the core of International and Migration Law. Sovereignty, traditionally understood as the absolute power of the State to control its borders and define its nationality, clashes with the emergence of the individual as a subject of International Law. The Postgraduate Program in International Law, Migration and Immigration offers the lens through which to analyze this phenomenon. It is argued that Migration Law is not merely a branch of Administrative Law, but the field where this tension is most visible. We analyze institutions such as *non-refoulement* and the fight against statelessness as inflection points where the protection of human dignity transcends the discretionary power of the State, reconfiguring the very foundations of Public Law. It is concluded that the future of global governance depends on a reinterpretation of sovereignty, not as an absolute power, but as a responsibility to protect, aligned with humanitarian principles.

Keywords: International Law; Migration and Immigration; State Sovereignty; Human Rights; Refugee Law; Non-Refoulement; Statelessness.

Abstract

This article investigates the fundamental dialectical tension between the classic concept of state sovereignty, a pillar of a Law degree, and the demands of the international Human Rights regime, central to International and Migration Law. Sovereignty, traditionally understood as the absolute power of the State to control its borders and define its nationality, collides with the emergence of the individual as a subject of International Law. The Postgraduate specialization in International

Law, Migration, and Immigration provides the lens to analyze this phenomenon. It is argued that Migration Law is not merely a branch of Administrative Law, but the field where this tension is most visible. We institutes such as *non-refoulement* (non-return) and the fight against statelessness as inflection points where the protection of human dignity transcends the discretionary power of the State, reconfiguring the very foundations of Public Law. It is concluded that the future of global governance depends on a reinterpretation of sovereignty, not as an absolute power, but as a responsibility to protect, aligned analyze with humanitarian principles.

Keywords: International Law; Migration and Immigration; State Sovereignty; Human Rights; Refugee Law; Non-Refoulement; Statelessness.

1. Introduction: The Dialectic between the State and the Individual in Modern Law

The legal system, as studied in undergraduate law programs, is historically based on the figure of the nation-state. Since the Peace of Westphalia, the concept of sovereignty has been the cornerstone of public law, defining the state as the supreme authority within a territory, with a monopoly on force and, crucially, the power to determine who belongs and who does not belong to its political community. This classic, state-centered view relegated the individual to a secondary role on the international stage, with their protection almost entirely dependent on the bond of nationality. Without this bond, the individual was, for international law, an abstraction.

The 20th century, however, brought about a Copernican revolution in this paradigm. The atrocities of the World Wars exposed the fallacy that the protection of the individual could be left exclusively to the discretion of the sovereign state. The emergence of the international human rights regime, with the Universal Declaration of 1948, marked the rise of the individual as a subject of international law. For the first time, a body of norms was established that aimed to protect human dignity universally, regardless of nationality, placing clear ethical and legal limits on the sovereign power of the state.

It is precisely at this intersection, in this dialectical tension between the sovereign power of the State and the universal rights of the individual, that the phenomenon of contemporary migration is situated. The Postgraduate Program in International Law, Migration and Immigration is dedicated to studying the legal field that flourishes in this exact zone of conflict. The migrant, the refugee, the asylum seeker, and the stateless person are the legal figures who daily test the limits of state sovereignty and the effectiveness of International Human Rights Law.

This article proposes to analyze academically how this fundamental tension is processed by Law. We argue that Immigration Law, informed by Postgraduate studies, has ceased to be a mere set of administrative rules on visas and passports—a limited view that could derive from a superficial reading of Administrative Law—to become one of the

The most dynamic and challenging branches of Public International Law. It is the laboratory where the concepts of border, nationality, belonging, and dignity are being redefined.

Undergraduate law training provides the indispensable theoretical foundation, such as General Theory of the State, Constitutional Law (which defines nationality), and Administrative Law (which governs border police power). Specialization in International and Migration Law, in turn, offers the critical tools to question the rigidity of these classic concepts, introducing humanitarian principles that act as norms of restraint on state power.

We will analyze how specific legal institutions, such as the principle of *non-refoulement* and conventions on statelessness, function as ethical "Trojan horses" within the fortress of sovereignty. These principles demonstrate that, under certain circumstances, the duty to protect the life and dignity of a non-national *outweighs* the sovereign right of the State to control its borders.

The aim of this work is, therefore, to academically trace this transformation. Starting from the fundamentals of state sovereignty learned during undergraduate studies, we will demonstrate how the Human Rights regime has modified them, and how Migration and Refugee Law, the focus of the Postgraduate program, is the battleground where the balance between state order and human justice is being negotiated.

The relevance of this analysis is pressing. In an era of unprecedented human displacement, caused by conflict, climate change, and economic inequality, the response that law will give to this tension will define not only the future of global governance, but the very substance of our commitment to human dignity, the pillar of the entire legal system.

2. The Westphalian Paradigm: Sovereignty and Nationality as Foundations of Classical Law

The undergraduate law program, in its foundational disciplines such as General Theory of the State and Public International Law, presents the Westphalian model as its central pillar. Born from the peace of 1648, this model established the sovereign nation-state as the main, and almost exclusive, actor in international relations. Sovereignty, in this context, is defined by its internal dimension (supreme power over a territory and its population) and external dimension (independence and legal equality in relation to other states). This conception is the basis upon which all modern Public Law has been built.

One of the most essential and undeniable attributes of this classical sovereignty is the power to define its own population. The State holds the monopoly on granting "nationality." This legal bond, which connects the individual to the State, was the *sine qua non* condition for the existence of rights. Outside of this bond, the individual did not possess "status" on the international plane. Nationality, therefore, functioned as the "entry ticket" to the world of rights.

Constitutional Law, a core discipline in undergraduate studies, focuses on detailing how each State exercises this sovereign power. The mechanisms for acquiring nationality, notably *jus soli* (right of soil, common in the Americas) and *jus sanguinis* (right of blood, traditional in Europe and Asia), are the ultimate expression of this state discretion. The choice of one system or another reflects profound political decisions about the nature of the nation—whether it is a territorial civic contract or an ethno-cultural community.

In this paradigm, the border emerges as the physical manifestation of legal sovereignty. Administrative Law, through the concept of "police power," grants the State the authority to control who enters and who remains in its territory. The admission of a foreigner was not, in Classical Law, a "right" of the foreigner, but a "privilege" or an act of "grace" granted by the sovereign, based entirely on its own economic, political, or security interests.

The logical corollary of this power to admit is the power to exclude. The right to expel, deport, or extradite non-nationals was seen as an equally absolute prerogative of the sovereign. The State did not need to justify its decision before a higher authority, as there was no higher authority. The treatment of foreigners was a matter of "reserved domain," an area of domestic policy immune to intervention or scrutiny under International Law.

This model, while legally elegant in its simplicity, reveals a colossal moral and practical gap: it is blind to the "humanity" of the non-national. In Classical Law, the foreigner is treated less as a "subject of rights" and more as an "object" of state policy. Their protection depended entirely on the goodwill of the host state or the diplomatic intercession of their state of origin ("diplomatic protection"), which only occurred if the latter so desired.

The fragility of this system became catastrophically evident in the interwar period and during the Second World War. The emergence of millions of refugees and stateless persons—
Individuals who were either persecuted by their own states or had their nationality revoked—this exposed the fragile bond of nationality. These people became human "surplus," without a state to protect them and without the right to be anywhere, as Hannah Arendt analyzed.

Therefore, a law degree provides us with the indispensable foundation: the model of absolute sovereignty. This model is the "problem" that the Postgraduate Program in International and Migration Law must solve. Modern Migration Law arises precisely from the realization that this classic paradigm is ethically indefensible and humanitarianly bankrupt, requiring a new international legal architecture.

3. The Human Rights Revolution: The Individual as a Subject of International Law

The legal order that emerged from the ashes of the Second World War represented a paradigm shift. Law degrees, by introducing International Human Rights Law,

This marks a turning point. The UN Charter (1945) and, even more explicitly, the Universal Declaration of Human Rights (UDHR) of 1948, initiated a process of "humanizing" International Law. For the first time, the individual was placed at the center of international legal protection, regardless of their nationality.

The fundamental principle of this new order is that certain rights are "inherent" to the human person, not "granted" by the State. Rights such as life, the prohibition of torture, and dignity are not privileges of citizens; they are attributes of human beings. This premise, although philosophically ancient, has become legally binding through a series of international treaties that followed the UDHR, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966).

This legal revolution, studied in undergraduate studies, created the central tension of this article. By establishing universal norms of protection, International Human Rights Law began to erode the "reserved domain" of States. The way a State treats *any* person within its territory—whether national or foreign—ceased to be a purely domestic matter and became a matter of international legitimacy. "Sovereign power" found a clear limit: "human dignity."

International Law, Migration and Immigration, the focus of the Postgraduate Program, is the field where this limitation of sovereignty becomes most concrete. If the Universal Declaration of Human Rights (UDHR) affirms in Article 13 the right to "leave any country, including one's own" and "to return to it," and in Article 14 the right to "seek and enjoy asylum in other countries," it directly clashes with the sovereign power to control borders, analyzed in the previous section. Migration Law attempts to mediate this conflict.

It is important to note that the Human Rights regime did not *abolish* sovereignty. The UDHR did not establish a universal "right to immigrate"; Article 13 does not include a "right to enter" any country. States retain the right to regulate the entry of foreigners. What the Human Rights regime did was establish that, *once* an individual is under the jurisdiction of a State (even if on its border or in an irregular situation), that State has positive and negative obligations of protection towards that individual.

Classical Administrative Law, which viewed the act of admission or deportation as purely discretionary, is forced to adapt. The administrative act of "refusal of entry" or "deportation order" can no longer be arbitrary. It must respect "due process of law," must be reasoned, and, most importantly, cannot result in the violation of fundamental human rights of the migrant, such as the right to life or physical integrity.

The Postgraduate Program in International Law delves deeper into this point by studying the *erga omnes* (towards all) and *jus cogens* (peremptory norms) obligations of International Law. The prohibition of torture, for example, is a *jus cogens norm.* No State can deport an individual, even if they are in an irregular situation, to a country where there is a substantial risk that they will be tortured. This is an absolute limit to sovereignty.

Therefore, the Human Rights revolution, which began in the second half of the 20th century, provided the ethical and legal framework for the development of Migration Law. It created the legal "weapons" that migrants and refugees can wield against sovereign power. This postgraduate program is dedicated to understanding how these weapons are used and how they are slowly forging a new balance between the State and the individual.

4. International Migration Law as a Field of Academic Synthesis

International Law, Migration and Immigration, the central focus of the Postgraduate Program, is the branch of law that academically emerges as a synthesis of the disciplines and tensions described previously. It is not an isolated field, but rather a "meta-field" that feeds on, and at the same time challenges, various branches of law learned during undergraduate studies. It is, par excellence, the field of legal interdisciplinarity.

First and foremost, Immigration Law engages intensely with Constitutional Law. It is the Constitution of each country that establishes the fundamental norms regarding nationality and the legal status of foreigners. Immigration Law studies how national Constitutions (e.g., the Brazilian Constitution and its principle of the prevalence of human rights in international relations) incorporate the norms of international migration and refugee treaties, creating a system of "dual protection."

Secondly, it is deeply intertwined with Administrative Law. Most migration processes (visas, residence permits, naturalization processes, deportation, and refugee status) are, in form, administrative processes. However, postgraduate studies teach that these cannot be treated as ordinary administrative processes. The "object" of the act (the life and liberty of the migrant) demands reinforced procedural guarantees, going beyond the formalism of classical Administrative Law.

Thirdly, Migration Law is inseparable from International Human Rights Law. In many respects, it is the practical and specialized application of Human Rights to a specific vulnerable group: non-nationals. While Human Rights establish the "what" (prohibition of discrimination, right to life), Migration Law establishes the "how" (how this applies at a border post, in a migrant detention center, or in an asylum application process).

The Postgraduate Program in International Law also introduces International Refugee Law as a crucial sub-branch. This is a *special* and more robust protection regime, based on the 1951 Convention. It applies to individuals fleeing "well-founded fear of persecution." The legal analysis here is complex, requiring the legal practitioner to determine the credibility of a persecution narrative, an exercise that blends legal, geopolitical, and psychological analysis.

Furthermore, the specialization addresses the "new" migratory flows that challenge classic categories. Where do "climate refugees" or "environmental refugees" fit in? They don't fit the 1951 definition of "persecution," but rather flee existential threats. Contemporary Migration Law is at the forefront of the academic debate on expanding the concept of "international protection" to encompass these new victims of global crises.

Labor Law is another area of undergraduate studies that is directly impacted. The Postgraduate Program in Migration studies the Conventions of the International Labour Organization (ILO) on migrant workers. The debate focuses on how to guarantee basic labor rights (minimum wage, workplace safety) to workers in irregular situations, combating precarious work and exploitation, which, in turn, protects the labor market as a whole.

Complexity is also evident in Private International Law. Issues such as marriage between people of different nationalities, international custody of minors, validity of foreign diplomas, and succession (inheritance) of assets located in multiple countries are routine legal problems in the life of a migrant, requiring the jurist to have sophisticated knowledge of conflict of laws in space.

Therefore, Immigration Law, as a subject of study in a Postgraduate program, is a synthesis discipline. It requires the jurist to mobilize their fundamental knowledge from their undergraduate law degree (Constitutional, Administrative, Human Rights, Labor, Private International Law) and apply it to a complex human problem, mediated by the central tension between the sovereign authority of the State and the universal dignity of the individual.

5. The Principle of *Non-Refoulement:* The Absolute Limit of State Sovereignty

If there is a legal institution that represents a break with the classical sovereignty of Westphalia, it is the principle of *non-refoulement* (non-return). This principle is undoubtedly the heart of International Refugee Law and a central pillar of the Postgraduate Program in International Law, Migration and Immigration. It establishes that no State may, under any circumstances, expel or "return" a refugee or asylum seeker to a territory where their life or freedom is threatened.

This principle, enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees, is a direct and unequivocal limitation on the sovereign power of deportation, which was considered absolute in Classical Law (studied in undergraduate studies). It represents the victory of the obligation of humanitarian protection over the power of border policing. The State *loses* its administrative discretion to exclude when exclusion means placing a human being in mortal danger.

The academic importance of *non-refoulement* lies in its legal force. Most international jurists and international courts consider that this principle has transcended the 1951 Convention and achieved the status of "international custom," and for many, even *jus cogens.*
(peremptory norm of International Law). This means that it is binding on *all*

States, even those that have not signed the Refugee Convention, and this cannot be derogated from by treaties to the contrary.

The postgraduate course explores the complexities of its application. The principle applies not only to the formal "deportation" of someone already in the country, but also to "refusal of entry" at the border. This is crucial. A border guard, as a state agent exercising administrative law, cannot simply "bar" an individual who claims fear of persecution.

He has an international legal obligation to hear this claim and forward it for refugee proceedings.

The legal analysis for applying *non-refoulement* is highly technical. It requires a prospective "risk assessment." The lawyer or immigration officer must analyze: what is the *real* and *individualized* risk that this person will face if returned? This requires a deep understanding of the human rights situation in the country of origin, a central matter of international law.
The legal basis for the decision is not the "legality" of the migrant's entry, but the "safety" of their life.

The principle is also fundamental in the debate about "safe third countries." Many states try to argue that they do not need to examine an asylum application if the applicant has passed through another "safe" country before arriving. The Postgraduate Program studies the legality of these agreements. Return to a "safe third country" is only legal if there are absolute guarantees that this third country will, in fact, examine the asylum application and *also* respect the principle of *non-refoulement* (the principle of "non-chain return").

The expansion of this principle is one of the most vibrant topics in Migration Law. Regional Human Rights Courts, such as the European Court of Human Rights, have expanded protection beyond the 1951 "persecution" provision. They have prohibited the return of individuals, even if they are not refugees, to countries where they face a risk of torture or inhuman or degrading treatment (applying Article 3 of the European Convention on Human Rights). This is called supplementary *non-refoulement* .

In short, the principle of *non-refoulement* is the most powerful legal manifestation of the thesis presented in this article. It is the point where undergraduate and postgraduate law studies most dramatically intersect. The administrative police power of the State is formally suspended by the humanitarian obligation of International Law. It is legal proof that, in modern law, sovereignty is no longer absolute, but conditioned upon respect for human dignity.

6. Statelessness and the "Right to Have Rights": The Failure of Sovereignty and the International Response

If classical sovereignty, studied in law school, is expressed by the power to grant nationality, then "statelessness" represents the catastrophic failure of this system. A stateless person is an individual whom *no* state considers its national. They are the personification of a legal vacuum; a person who, from the perspective of classical law, does not possess the "entry ticket" to the country.

The world of rights. The philosopher Hannah Arendt, analyzing stateless Europeans in the postwar period, coined the definitive expression: they had lost not only their rights, but the "right to have rights".

The study of statelessness is a crucial component of the Postgraduate Program in International Law, Migration and Immigration, as it exposes the limits of protection based on the nation-state. Undergraduate law studies teach us, through Civil Law, that legal personality begins with live birth, but it is nationality (studied in Constitutional Law) that makes this personality "effective" on the international level. A stateless person has legal personality, but cannot exercise it, as they lack a state to promote and protect it.

The causes of statelessness are a field of study that combines Constitutional Law and Private International Law. It can occur due to a "negative conflict of laws": a child born in a country of *jus soli* (which grants nationality by soil), whose parents are from a country of *jus sanguinis* (which grants nationality by blood, but only if born in its territory). The child does not acquire the nationality of either country. Statelessness can also be *de jure,* as a result of discriminatory laws (based on race, gender, or ethnicity) or as a political punishment, where the State actively "revokes" citizenship.

International Law, the focus of the Postgraduate Program, responded to this systemic failure with two main conventions: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The first is a *protective instrument:* it seeks to ensure that stateless persons legally residing in a country have a minimum "status" and rights (such as access to education, work, and travel documents), attempting to replicate the rights of a national.

The 1961 Convention is a *preventative instrument.* It is more radical because it directly interferes with state sovereignty over nationality. It *obliges* signatory states to grant nationality to children born in their territory who would otherwise be stateless. This is a monumental legal advance. The state, in this case, is not "granting" nationality at its discretion; it is "fulfilling an international obligation" to prevent a greater evil.

The Postgraduate Program analyzes how these treaties interact with national laws. Brazil, for example, in its Migration Law (2017), has advanced mechanisms for the protection of stateless persons, facilitating naturalization and ensuring that no one born on Brazilian territory is stateless (reinforcing *jus soli).* This is an example of how Constitutional and International Law can be harmonized.

Contemporary academic debate on statelessness, explored in this specialization, focuses on its intersection with other migratory phenomena. Stateless people often become refugees, as the lack of nationality can itself be a form of persecution. They face barriers.

Extreme situations, as they cannot obtain passports to flee legally and have no country to "return" to.

In short, statelessness is the ultimate academic proof that the Westphalian model of sovereignty is insufficient. It demonstrates that the bond of nationality, while fundamental, cannot be the sole source of rights. The response of International Law to statelessness, although still incomplete, reinforces the central thesis: modern law is slowly building a "status" of human dignity that is universal and that must prevail even when the State itself fails in its most basic function.

7. The Limits of Governance: The Fragmentation of Global Migration Law

Despite significant advances in the protection of Human Rights, the field of International Law, Migration and Immigration is marked by profound fragmentation and the absence of unified global governance. This is a central academic finding that emerges from postgraduate studies. While other areas of international relations have central organizations with regulatory power (such as the World Trade Organization - WTO for trade, or the World Health Organization - WHO for health), migration does not have an equivalent.

The International Organization for Migration (IOM), although now part of the UN system, is not a "regulatory" body; it is an agency that operates on the basis of consensus and cooperation, focused more on "managing" flows than on "creating" binding norms. The refugee protection regime, based on the 1951 Convention and UNHCR, is robust, but covers only a specific fraction of migrants (those fleeing persecution). The vast majority of migrants—the "economic migrants"—fall into a governance gap.

A law degree, when studying Public International Law, teaches that the "consent" of the State is the basis of international obligation ("pacta sunt servanda"). States, to this day, have been extremely reluctant to consent to a binding global treaty on economic migration. Sovereignty, in this field, remains strong. States want to maintain discretionary control over whom they admit to work, reflecting a view that labor migration is a tool of domestic economic policy, and not a matter of global governance.

This fragmentation results in a "mosaic" of regimes. We have a strong refugee regime (the focus of the Postgraduate Program), regional free movement regimes (such as that of the European Union or Mercosur, studied in International Law), and a myriad of bilateral labor agreements.
But there is a lack of a global "operating system" that establishes universal minimum rights for economic migrants.

The Postgraduate Program in International Law studies recent efforts to fill this gap, notably the "Global Compact for Safe, Orderly and Regular Migration" (2018). It is academically crucial to note that this document, although historic, was negotiated as a "non-binding" pact (soft law). It establishes a "menu" of good practices and objectives, but does not

It creates legal "obligations." The negotiation of the Pact revealed how politically sensitive the issue of sovereignty over migration still is.

The academic challenge, then, is to analyze how law evolves in the absence of treaties. Migration law advances through alternative channels: international "custom," decisions of regional human rights courts (which expand protection), and "dialogue" between national courts (such as a supreme court of one country citing the decision of another on migrants' rights). Postgraduate studies should train legal professionals to identify these "diffuse" sources of law.

A law degree provides the foundation of what law *is* (treaties, constitutions), while postgraduate studies explore what law *is becoming* (soft law, custom, transnational jurisprudence). Migration governance is a perfect example of a law "in formation," being built "bottom-up" through state practice and judicial decisions, as well as "top-down" through conventions.

In short, the Postgraduate Program in International Law, Migration and Immigration not only teaches existing laws but also exposes their gaps. The fragmentation of migration governance is the greatest challenge for the humanist thesis. It demonstrates that, although the *principles* of Human Rights are universal, their *application* to migrants is still inconsistent, politicized, and deeply hostage to the sovereign will of the State—the original tension that motivated this article.

Conclusion: Towards Sovereignty as Responsibility

This article traces the academic journey that begins with the fundamentals of Law and culminates in the contemporary challenges of International Law, Migration, and Immigration. We begin with the Westphalian paradigm, where state sovereignty was absolute and nationality was the key to accessing all rights. We have seen how this model, taught in undergraduate studies, was legally cohesive but morally flawed, creating "vacuums" of protection for those who did not fit within its borders: foreigners, refugees, and, above all, stateless persons.

The human rights revolution, also a pillar of legal education, challenged this order. She introduced a new protagonist onto the international stage—the individual—and a new limit to state power—human dignity. We argue that Migration Law, the focus of the Postgraduate Program, is the field where this tension between sovereign power and universal rights is most acutely negotiated.

We analyzed specific legal institutions that emerge from this tension. The principle of *non-refoulement* arose as the clearest limit to sovereignty, where the duty to protect life (a human right) suspends the right to deport (a sovereign power). The regime to combat statelessness, in turn, demonstrated the need for International Law to intervene in the very granting of nationality to prevent the total exclusion of the individual from the legal world.

We also observed the limitations of this evolution. Global governance of migration remains fragmented. The reluctance of states to cede sovereignty in the field of economic migration demonstrates that the Westphalian paradigm, although ethically outdated, still holds formidable political power. Migration law, therefore, is a field of continuous "struggle" and "formation."

The academic synthesis of a Law degree with a Postgraduate degree in International Law, Migration and Immigration is what allows the modern jurist to work in this field. It requires the technical rigor of Administrative and Constitutional Law and, simultaneously, the humanitarian sensitivity and global perspective of International Law.

It can be concluded that the only progressive resolution to this tension is the redefinition of sovereignty itself. Modern law is moving towards a concept of "sovereignty as responsibility." The State is not sovereign to "do whatever it wants," but is sovereign to "fulfill its responsibility" to protect the rights of *all* under its jurisdiction. The protection of migrants and refugees ceases to be an act of charity and becomes a central obligation of state legitimacy itself. This is the intellectual contribution and future praxis for the jurist who masters both areas of knowledge.

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